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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-451

PATRICIA LOU KENNEDY, DR. VERNON G. BOIDO, FRANCES V. DUREN, CHARLES T. TART, PH.D., THE CHURCH OF THE AWAKENING, A NEW MEXICO RELIGIOUS CORPORATION, AND JOHN W. AIKEN,
Petitioners,

vs.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS, UNITED STATES DEPARTMENT OF JUSTICE; JOHN E. INGERSOLL, DIRECTOR,
Respondents.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

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The Petitioners, Patricia Lou Kennedy, Dr. Vernon G. Boido, Frances V. Duren, Charles T. Tart, Ph.D., The Church of the Awakening, a New Mexico Religious Corporation, and John W. Aiken, respectfully pray that this Court grant a rehearing on their Petition for a Writ of Certiorari filed herein; and that upon such rehearing that a Writ of Certiorari issue to review judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 5, 1972.

INTERVENING CIRCUMSTANCES OF SUBSTANTIAL AND CONTROLLING EFFECT.

Justice Department's determination to disregard Appeals Court decision below. One intervening circumstance relied upon as ground for this rehearing is that, following denial of Certiorari herein on January 8, 1973[1] the Department of Justice, Bureau of Narcotics and Dangerous Drugs, has made a considered decision to continue in force the regulation exempting religious use of Peyote by the Native American Church.[2]

The Court of Appeals has held that the regulation is void as creating an arbitrary classification in excluding "all other churches that use Peyote in bona fide religious ceremonies" from the exemption granted the Indian Church.[3]

To reach such conclusion the Court held: "We are . . . unable to perceive that any of the distinctions that the Government draws between the members of the Native American Church and the rites of the Church and members of the Church of the Awakening and its rites have any bearing on the legitimate Government end to be served. We cannot say that the Government has a lesser or different interest in protecting the health of Indians than it

1. A like determination by the Bureau was made following the Court of Appeals decision April 5, 1972. If known to it, this would have prompted rehearing by that Court. The earlier determination raises an interesting question of candor owed this Court on certiorari.

2. (21 C. F. R. 307.31; Pet. App. A. 40). This regulation is promulgated under the current law (21 U. S. C. 812(c), Sched. (I) (c) (12), and would be controlled by decision favoring petitioners under the savings provision of the 1970 statute (21 U. S. C.) 321 .... note .... savings provision; Pet. App. A. 40)

3. Pet. App. A. 37. The Court holds that the amendment of the regulation sought by Petitioners to include the Church of the Awakening within the exemption, created a class no less arbitrary; and denied petitioner relief for that reason.

has in protecting the health of non-Indians. We cannot say that the Government's interest in a church member's health increases or diminishes depending on whether his ingestion of a dangerous drug is of greater or less importance in the religious ceremonies of his church.'"[4]

The arbitrary classification found by the Court would be alleviated if the exemption included "all other churches that use Peyote in bona fide religious ceremonies." Such broadening of the exemption would include use by the Petitioning Church. The Government refuses to recognize the finding of arbitrary classification; but wholeheartedly approves denial of relief to Petitioners.

Petitioners' action in the case was predicated on the regulation, amendment of which was sought under the appropriate administrative procedure,[5] and when the Appeals Court voided the regulation, it undercut the vehicle by which Petitioners come into Court. Thus Petitioners are left in limbo; and adjudicated so by a decision the Department of Justice ignores.

Under these circumstances, we submit that in equity and good conscience the stance now taken by the Government should be considered equivalent to a confession of error before this Court, and that certiorari should be granted here.

The legalistic shell game resultant from the proceedings below affords ample basis for such course.[6]

But the Petitioners' rights are not the sole consideration for such review. Other cases involving similar issues in-

4. Pet. App. A. 36. This reasoning is applied to due process under the Fifth Amendment, which was not raised. It is equally cogent to the Establishment clause of the First Amendment, which was raised.

5. 21 U. S. C. 371(e).

6. Gravely mistaken and misleading statements of issues, calling for Rule 19.1(b) Supervision, are shown *post*.

evitably will reach this Court. Thus the press of this Court's business should not deter review. Rather, review now will conserve effort in the long run.

There is no inclination on the Department of Justice to broaden the regulation as the Appeals decision requires under the Fifth Amendment or, as we have argued, for even-handed treatment under the Establishment Clause of the First.

If these Petitioners are correct in their contentions, a finding so by this Court should issue quickly. Delay only subjects citizens to the degrading treatment accorded the defendants in *Whittingham*, discussed below, most of whom pleaded guilty despite their Constitutional right to conduct themselves as they did.

We suggest the ultimate solution as to use of psychedelic drugs,—of which this case is but a tiny part,—lies in the area of religion. To grant certiorari here will provide a start in that direction.

Second intervening circumstance,—Arizona case decided January 9, 1973. The Arizona Court of Appeals, Department A, Division One at Phoenix, decided *Arizona* v. *Whittingham, et al.*, on said date reversing the conviction of Greg and Janice Whittingham, both 26, of Grenada Hills, California for possession of Peyote, a misdemeanor under Arizona law. The opinion is as yet unpublished.

Over forty people, some Indians and others non-Indians, gathered together at Parks, Arizona "to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple". The ceremony was presided over by Indians from the Navajo reservation and constituted a meeting of the Native American Church. While Janice Whittingham testified she was one fourth Blackfoot Indian, her husband and most of the others present were non-Indian. All present were charged with

possession of Peyote. The Indians were dismissed, the Whittinghams were convicted, and all of the others pleaded guilty and received probation.

The Court upheld the right of the Whittinghams to partake of Peyote as sacrament in the Native American Church ceremonies under the First Amendment.

Both the Department of Justice in its briefs in this case, and the concurring opinion of Judge Crocker sitting with the Ninth Circuit, make much of the distinction between Indians and non-Indians insofar as the use of Peyote in religious ceremonies is concerned.

The Arizona case refutes the Government assertion that the regulation confines religious use of peyote to Indians alone.[7] Non-Indian participation in Native American Church ceremonies makes the regulation now reaffirmed by the Government clearly discriminatory. To decline review in the light of the Arizona case permits continued Government action to thwart religious freedom.

The reasoning of the Arizona decision likewise obliterates all of the corollaries of that distinction argued by the Department of Justice, i.e.: cultural differences between Indians and non-Indians; the different legal status of Indians on reservation and white citizens; and the historic usage of Peyote by the native American Indian. The brief of the Government before this Court indicates that these questions will be relied on in the future in like cases.

We submit that this Court should review this matter at this time and settle finally all such questions.

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7. "However, membership to persons who are not members of Indiana Tribes or do not have Indian heritage, is usually not refused." *Arizona* v. *Whittingham*, Jan. 9, 1973, *supra*.

OTHER SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER NOT PREVIOUSLY PRESENTED.

The majority opinion seriously misstates the issues before the Court. A different case than the one presented to the Court is shown by the majority opinion of the Court of Appeals.

Immediately below is reproduced the mistaken Statement of issues:

> The substance of petitioners' primary contention is that section 320.3(c)(3) violates the due process clause of the Fifth Amendment because the regulation creates an arbitrary classification distinguishing between (a) members of the Native American Church who use peyote in bona fide religious ceremonies who are exempt and (b) members of the Church of the Awakening who use peyote in bona fide religious ceremonies who are not exempt. (Pet. App. A. 35)

No such contention was made, primary or otherwise.

In an Appendix, *post*, we show the Summary of Arguments of the Briefs before the Appeals Court. The contentions made by Petitioners were based solely on the religious freedom clauses of the First Amendment, that in favoring the Indian Church and denying theirs, such action was a violation of the Establishment clause; that Government attempt to justify the distinction on a doctrinal basis was interference with Free Exercise; and that to deny the exemption to petitioning church on grounds of health, while allowing like use to another, violates Free Exercise.

Had the issues before the Court been stated correctly, the opinion could not have said as it did:

> The question whether or not the religious use of peyote by the members of any church is protected by the First Amendment is not properly before us. The only issue is the constitutionality of the exemption regulation. (Pet. App. A. 37)

Moreover, it was not the *regulation* that was contended to be unconstitutional, but the *interpretation* given it in the administrative proceedings below.

We submit that such an erroneous description by an appeals court in a case involving First Amendment questions of religious freedom constitutes such departure "from the accepted and usual course of judicial proceedings * * * as to call for the exercise of this court's power of supervision".[8]

Only the members of this Court can say what effect these misstatements of the issues before it by the Court of Appeals may have had on their vote as to Certiorari here. Verity would be more apt to be attributed to the opinion than to counsel, so the impact could be fatal.

We petitioned for rehearing before the Appeals Court in banc. We must guess as to the result of the misleading statements on those Judges not participating in the decision there.

Thus, the members of this Court, and the other judges of the Ninth Circuit, were given to believe that only a Fifth Amendment contention was raised. It is certainly possible, if not probable, that less consideration was accorded such issue than would have been the case if the First Amendment questions actually presented were correctly shown in the Court of Appeals opinion.

Taken by themselves, the mistaken statements compel certiorari under Rule 19.1(b) of this Court.

When we consider that the misstatements bind alone of all the world the Petitioners whose actual contentions are distorted by the Court, the situation becomes a travesty! Such is the effect produced by the determination by our adversary to disregard the decision.

This is the legalistic sleight of hand referred to in the

8. Rule 19.1(b).

forepart of this Petition. Certainly it justifies the appellation.

Unpopular causes are especially to be protected. We ask if this Court has overlooked that it is the claims of unpopular classes, sects and groups, the odd-balls, which must be protected if fundamental rights are not to be eroded.

We suggest that appropriate test in said cases for granting Certiorari would be the degrees of dislike, disagreement or aversion which the particular Justice has respecting the religious practice for which petitioners seek protection. To apply the test, a vote would tend to be affirmative in direct proportion to the degree of dislike, disagreement, or aversion.

CONCLUSION.

For the reasons set forth a rehearing is prayed on the Petition for a Writ of Certiorari herein; and that upon such rehearing a Writ of Certiorari issue as heretofore prayed.

Respectfully submitted,

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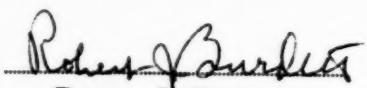
January 29, 1973.

CERTIFICATE

I, ROBERT J. BURDETT, do hereby certify that I am counsel for Petitioners herein and that said Petition is presented in good faith and not for delay.

I do further certify that said Petition is restricted to intervening circumstances of substantial and controlling effect, consisting of the determination of the Department of Justice to continue in effect the regulation held invalid by the Court of Appeals below, and of the Arizona Appeals Court decision referred to, handed down January 9, 1973; and limited also to other substantial grounds available to Petitioners but not previously presented, namely, that the mistaken and misleading statement of the issues by the Court below calls for the supervisory power of this Court; and the point that unpopular causes are especially to be protected.



ROBERT J. BURDETT

Chicago, Illinois
January 29, 1973.

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